76-752

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES PAROLE COMMISSION, APPELLANT

v.

LYMAN T. SHEPARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-19a) is reported at 541 F.2d 322. The memorandum opinion of the district court (App. B, *infra*, pp. 20a-22a) is not reported.

JURISDICTION

In this civil *habeas corpus* case the court of appeals filed an opinion on September 7, 1976, declaring that portions of the Parole Commission and Re-

organization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*, are unconstitutional (App. A, *infra*, pp. 13a-17a). Judgment was entered the same day (App. C, *infra*, p. 23a). A notice of appeal to this Court (App. D, *infra*, pp. 24a-25a) was filed in the court of appeals on October 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742 n. 10; see also *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-32; *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.[1]

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution provides in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Pertinent provisions of statutes and regulations appear in Appendix E, *infra*, pp. 26a-33a.

QUESTION PRESENTED

Whether the provisions of the Parole Commission and Reorganization Act for considering the status of

[1] If the Court should conclude that the portion of the court of appeals' opinion declaring the Parole Commission and Reorganization Act to be unconstitutional is *dictum* and for that reason hold that the decision below is not reviewable by appeal, we ask that it treat this jurisdictional statement as a petition for a writ of certiorari invoking this Court's jurisdiction under 28 U.S.C. 1254(1).

parolees who are convicted of crimes committed while on parole are unconstitutional.

STATEMENT

Appellee was convicted in the United States District Court for the Western District of Texas of interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312. In July 1972 he was sentenced to an indeterminate term of imprisonment not to exceed six years, pursuant to the provisions of 18 U.S.C. 5010(b) (App. A, *infra*, p. 2a). He did not appeal. He was paroled on April 18, 1974 (*ibid.*).

While on parole, appellee was convicted in a New York State court of attempted second-degree robbery. On December 17, 1974, he was sentenced to a term of up to four years' imprisonment for that offense (App. A, *infra*, p. 2a).

In January 1975 the United States Board of Parole issued a federal parole violator warrant, which was lodged with state authorities as a detainer. Appellee thereafter requested a prompt parole revocation hearing. Following a dispositional review conducted pursuant to 28 C.F.R. 2.53 (1975) (App. E, *infra*, pp. 31a-33a), the Board decided to allow the detainer to stand; it so advised appellee on August 14, 1975. The Board scheduled another review for the following year (App. A, *infra*, p. 5a).

In November 1975 appellee filed a petition for a writ of *habeas corpus* in the United States District

Court for the Northern District of New York. He alleged that the detainer prevented him from participating in educational and temporary release programs; he further alleged, in wholly conclusory terms, that delay in hearing could impair his ability to present evidence that might persuade the Board not to revoke his parole. Appellee argued that the delay in holding the revocation hearing violated the Due Process Clause (App. A, *infra*, pp. 2a-3a). On December 19, 1975, before the Board had filed a responsive pleading, the district court dismissed the petition (App. B, *infra*, pp. 20a-22a). It wrote that "no inflexible time limit for parole revocation hearings applie[s] to the United States Parole Board" (*id.* at 22a).

The court of appeals reversed. It first concluded that a parolee has several interests—access to prison rehabilitation programs, the desire to be released from the intervening sentence, the desire to present evidence in mitigation, and certainty of future disposition—that might be affected by a disposition of the warrant prior to the end of the intervening sentence (App. A, *infra*, pp. 8a-12a).[2] It thought that because the existence of a detainer in appellee's file subjects him to " 'grievous loss' " (*id.* at 12a), the detainer should not be allowed to stand in the absence

[2] The court noted that this case entails no possibility of loss of opportunity for concurrent service of the violator term and the intervening sentence, because appellee's federal sentence under the Youth Corrections Act runs uninterruptedly during the course of the intervening sentence (App. A, *infra*, pp. 11a-12a n. 6).

of procedural guarantees designed to ensure accurate decision making. The procedures formerly in effect and those provided by the new Act, the Court held, do not sufficiently protect the parolee's interests. The court identified several deficiencies in the procedures, primarily their failure to afford both a full and timely disclosure of the evidence considered against the parolee and to provide a statement of reasons for the decision to let the detainer stand. The court therefore held that the statutes and procedures presently in effect are constitutionally invalid (App. A, *infra*, pp. 12a-18a).[3]

The court of appeals remanded the case to the district court with directions to hold an evidentiary hearing to determine whether appellee's ability to present mitigating evidence had been impaired by the delay in providing an adequate hearing (App. A, *infra*, pp. 18a-19a). If so, the district court is to order the warrant quashed. If, on the other hand, the district court finds that mitigating evidence has not been lost, it is to require the Parole Commission to provide appellee with a review of his detainer in conformity with the court of appeals' view of the requirements of the Due Process Clause.[4]

[3] The court concluded, however, that the Due Process Clause does not always require a personal evidentiary hearing (App. A, *infra*, pp. 17a-18a).

[4] The Parole Commission has informed us that New York State authorities have granted appellee parole effective December 15, 1976. The Parole Commission then will execute its warrant, retake petitioner as a parole violator on the 1972

THE QUESTION IS SUBSTANTIAL

Moody v. *Daggett*, No. 74-6632, decided November 15, 1976, controls this case. Accordingly, we respectfully submit that it would be appropriate summarily to reverse the judgment of the court of appeals.

1. There is no material difference between the analysis of the court of appeals in this case and the analysis rejected in *Moody*. The court of appeals here concluded, as petitioner had argued in *Moody*, that the parolee has important interests—such as participation in rehabilitative programs during the intervening sentence and resolution of uncertainty concerning his future status—that require prompt hearings as part of the " 'basic elements of rudimentary due process' " (App. A, *infra*, p. 12a). The Court held in *Moody*, however, that the deprivations during the intervening sentence are fully justified by the intervening judgment of conviction, and that the parolee suffers no loss of "liberty" or "property," within the meaning of the Due Process Clause, until his parole ultimately is revoked by federal officials. *Moody* reaffirmed the Court's decision in *Morrissey* v. *Brewer*, 408 U.S. 471, 488, that the revocation hearing must be provided within a reasonable time *after* the parolee is taken into custody as a parole

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sentence, and hold a full oral hearing concerning the potential revocation of parole. See 18 U.S.C. 4214(c), App. E, *infra*, p. 30a.

violator, which has not yet happened to appellee. See *Moody*, *supra*, slip op. 8-9.[5]

2. The only arguable difference between *Moody* and this case is that, although in *Moody* the intervening sentence was another federal sentence, here the intervening sentence is a state sentence. In our view this difference is immaterial.

Assuming *arguendo* (as the Court did in *Moody*, *supra*, slip op. 10) that a prisoner's desire to be released on parole is an interest in "liberty" or "property" within the meaning of the Due Process Clause, we think it clear that the lodging of the detainer in this case did not "deprive" appellee of that interest.[6]

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[5] The Court observed in *Moody* that, although petitioner had argued that delay would allow mitigating evidence to be lost, he had not claimed that such evidence existed in his case (slip op. 9 n.9). This case presents the same situation; although appellee has complained in general terms that mitigating evidence may be lost, he has not argued that he has particular evidence to present, or that in fact any such evidence has been or may be lost. Moreover, if he had made such a claim to the Board of Parole (which he did not do), the Board would have determined whether such evidence, if true, might induce it not to revoke his parole, and it would have scheduled a hearing, if it appeared that one would be useful, to consider such evidence (see 28 C.F.R. 2.53 (1975), App. E, *infra*, pp. 31a-33a). As we argued in *Moody*, if some process is constitutionally due in this area, these procedures are fully adequate to safeguard against unjustified infringement upon a parolee's liberty or property interests during the interim.

[6] We continue to believe, however, as we argued in *Scott* v. *Kentucky Parole Board*, No. 74-6438, remanded for consideration of mootness, November 2, 1976, that a prisoner's desire to be released on parole is a unilateral expectation on his part

A detainer lodged by the United States does not make a New York State prisoner ineligible for parole; in this very case appellee has been paroled to federal custody well before the expiration of his state sentence (see note 4, *supra*). A detainer is nothing but "a matter of comity" (*Moody*, *supra*, slip op. 2 n. 2), a method of informing state authorities that the federal government ultimately will be interested in their prisoner. It does not require the State to take particular action or to postpone its own parole consideration. Indeed, the existence of a federal detainer may often enhance the prisoner's prospects for early parole from a state sentence, because the state authorities will know that the prisoner will revert to the custody of another sovereign that will consider whether release from imprisonment is appropriate. Even if this were not so, and if the detainer were to cause a State to defer granting parole, the Parole Commission could take this into account when making its decision after the end of the state sentence; in other words, the Parole Commission can compensate for any increased state imprisonment caused by its detainer. Cf. *Moody*, *supra*, slip op. 9 (federal statutes and regulations allow the Commission "to grant, retroactively, the equivalent of concurrent sentences").

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rather than an interest in "liberty" or "property." See also *Meachum* v. *Fano*, No. 75-252, decided June 25, 1976, slip op. 14 n. 8.

However that may be, the federal government should not be required to afford appellee an evidentiary hearing on the disposition of the warrant and detainer simply because the action of the State of New York, a separate sovereign, may be affected by the existence of the detainer. Appellee's complaint must be that the State should not be permitted to make parole decisions without being fully informed of the ultimate disposition of the federal parole revocation proceedings. But the remedy appellee seeks, a hearing at the beginning of the state sentence, would not often provide such information to the State. Each federal parolee receives a file review, and the Commission determines whether a hearing during the time that the intervening sentence is being served would be useful; in this case it determined that it would not be useful. If it were required to hold a hearing despite that conclusion, it seems evident that such a hearing would in almost every case simply produce a decision to defer making a final decision, or to make a tentative decision subject to reexamination at the end of the state sentence. Such a procedure would not add materially to the information the State already has under 28 C.F.R. 2.47(c)—that revocation of parole is the usual course.

Moreover, the argument that the State must be enabled to act with full knowledge of the decision federal officials will make is no more preferred, as a constitutional matter, than the argument that federal officials should be able to make their parole decision with full knowledge of the decision of state au-

thorities. Under the Parole Commission and Reorganization Act the Parole Commission ordinarily awaits the state decision, when the parolee is serving an intervening state sentence, before making the federal decision. Nothing in the Constitution requires the federal parole authorities to act first, in ignorance of the State's parole decision. One parole authority or the other must act first, and it was reasonable for Congress to conclude that the sovereign having custody of the prisoner during the intervening sentence should normally be the first to act. Cf. *Abbate* v. *United States*, 359 U.S. 187; *Bartkus* v. *Illinois*, 359 U.S. 121; *Paul* v. *Davis*, 424 U.S. 693, 707-712.

3. In any event, as we argued at length in our brief in *Moody* (pp. 38-54), if the Due Process Clause requires some procedures before the end of the intervening sentence, the existing procedures of the Parole Commission are more than sufficient.[7] Cf. *Mathews* v. *Eldridge*, 424 U.S. 319; *Moody*, *supra*, slip op. 8 n. 12 (Stevens, J., dissenting). The court of appeals' conclusions in this case (App. A, *infra*, pp. 12a-13a, 15a-18a)—that the Commission's procedures are deficient because they do not give the parolee adequate notice of the evidence against him and do not provide a statement of reasons for not executing the warrant immediately—do not cast doubt upon our submission.

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[7] A copy of our brief in *Moody* has been furnished to counsel for appellee. Appellee's counsel in the court of appeals in this case also represented petitioner Moody in this Court.

Even in a criminal case the Due Process Clause requires only notice of the charges, not notice of the evidence. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 14-15 n. 20. The charge in a parole revocation case like this one is the intervening conviction, of which the parolee is well aware. He is notified of it when the warrant issues. Even so, there is no formal "charge" until, after the intervening conviction, the Commission decides to seek revocation, and the parolee then not only is given a formal notice of the charge but also is advised of "[a]ll evidence upon which the finding of violation may be based" (28 C.F.R. 2.50(e)). Nor is there anything to the court of appeals' requirement that the Commission give the parolee a statement of reasons for not dismissing or executing the warrant before the end of the intervening sentence. The Commission's ordinary procedure is to defer making a decision (28 C.F.R. 2.47(c)), and it would serve no purpose for the Commission, in each case, to tell the parolee that it had found no extraordinary circumstances requiring a departure from its ordinary practice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 999—SEPTEMBER TERM, 1975

(Argued May 10, 1976 Decided September 7, 1976)

Docket No. 76-2021

LYMAN T. SHEPARD, APPELLANT

v.

UNITED STATES BOARD OF PAROLE, APPELLEE

Before:

KAUFMAN,
Chief Judge

SMITH AND MANSFIELD,
Circuit Judges

SMITH, *Circuit Judge*:

Lyman Shepard, a federal parolee serving a state prison sentence for a crime committed while on parole, appeals an order entered by the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge*, denying his

habeas corpus petition seeking relief in absence of prompt parole revocation hearing. We reverse and remand.

I.

In July of 1972, on conviction for interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. § 2312, Shepard was sentenced under the Youth Corrections Act to an indeterminate term of imprisonment not to exceed six years. On April 18, 1974, he was paroled. On December 17, 1974 he was sentenced in a New York state court for attempted second-degree robbery to a term of up to four years' imprisonment. He has been in a New York correctional facility since December of 1974.

In January, 1975, the federal parole board ("the Board") filed at the New York Facility as a detainer against Shepard a parole violation warrant based on his state conviction. Shepard requested a prompt parole revocation hearing to present evidence in mitigation of the charges underlying the warrant. But, in accordance with its regulations, after reviewing Shepard's case, the Board allowed the detainer to stand without affording him the requested hearing, promising only to re-examine his case in one year.

In November of 1975 Shepard filed his habeas corpus application. In it he alleged that, solely because of the detainer lodged against him, he was prevented from participating in educational and temporary release programs and from benefiting from

other privileges generally available to inmates. He also claimed that the Board's delay in affording him a parole revocation hearing was impairing his ability to present evidence in mitigation of the charges underlying the detainer. Shepard contended that the Board's failure to afford him a prompt revocation hearing violated his right to due process. The application was denied by the district court, and Shepard appealed.

II.

The court below had jurisdiction to entertain the instant habeas petition under 28 U.S.C. § 2241. The lodging of the parole violation warrant as a detainer against Shepard satisfied § 2241(c)(3)'s "in custody" requirement.[1] See, *e.g.*, *Jones* v. *Johnston*, —— F.2d ——, slip op. at 8 (D.C. Cir., March 23, 1976).

III.

On May 14, 1976, four days after oral argument before us, the statutory and regulatory framework challenged in Shepard's habeas application was replaced by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, and regulations promulgated in accordance therewith. Prior to May 14,

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[1] 28 U.S.C. § 2241(c)(3) states in pertinent part;

> The writ of habeas corpus shall not extend to a prisoner unless . . .
>
> * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

the Board's treatment of Shepard was regulated primarily by 28 C.F.R. § 2.53:

> (a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.
>
> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand;
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;
>
> (4) Execute warrant, thus permitting the sentence to run from that point in time. If

> the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.
>
> (c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

In accordance with this regulation, after reviewing Shepard's case but without affording him an evidentiary hearing, the Board allowed his detainer to stand and promised to reexamine his case in one year. Shepard claims that due process entitled him to an evidentiary hearing. The Board, on the other hand, contends that the procedures required by 28 C.F.R. § 2.53 were constitutionally sufficient, especially when considered in light of Shepard's right under what was then 18 U.S.C. § 4207 to a revocation hearing if he was subsequently "retaken" upon his parole violation warrant.[2] Shepard's position finds support in some of the circuits: *Jones* v. *Johnston*, —— F.2d —— (D.C. Cir., March 23, 1976); *United*

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[2] 18 U.S.C. § 4207 provided in pertinent part:

> A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

States ex rel. Hahn v. *Revis*, 520 F.2d 632 (7th Cir. 1975); *Cleveland* v. *Ciccone*, 517 F.2d 1082 (8th Cir. 1975), the Board's in others: *Reese* v. *United States Board of Parole*, —— F.2d —— (9th Cir., Jan. 12, 1976); *Colangelo* v. *United States Board of Parole*, No. 75-1249 (6th Cir., July 16, 1975), *aff'g* Civil No. 74-251 (N.D. Ohio, Dec. 20, 1974); *Gaddy* v. *Michael*, 519 F.2d 669 (4th Cir. 1975); *Orr* v. *Saxbe*, No. 75-1042 (3d Cir., June 17, 1975), *aff'g* Civil No. 74-341 (M.D. Pa., Nov. 27, 1974); *Small* v. *Britton*, 500 F.2d 299 (10th Cir. 1974); *Cook* v. *United States Attorney General*, 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974). The Supreme Court has granted certiorari in *Moody* v. *Daggett*, —— U.S. ——, 44 U.S.L.W. 3493 (March 1, 1976), *granting cert. to* —— F.2d —— (10th Cir., May 7, 1975), to resolve the conflict.

IV.

Recent cases have made it plain that due process entitles a parolee such as Shepard to an evidentiary hearing prior to the final decision to revoke his parole.

> There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.

Morrissey v. *Brewer*, 408 U.S. 471, 487-88 (1972).

The Board nevertheless argues that *Morrissey* does not establish Shepard's right to a hearing, pointing out that unlike Shepard, neither of the parolees in *Morrissey* had been convicted of committing a crime while on parole and quoting the Court to the effect that:

> Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

408 U.S. at 490.

This language may limit the issues, but does not do away with the hearing requirement.

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation.

408 U.S. at 488, *Gagnon* v. *Scarpelli*, 411 U.S. 778, 787-90 (1973), reaffirmed the due process right to hearing even after a conviction and went one step further, finding a due process right to be represented at a revocation hearing by appointed counsel when parolee's indigence, complex and difficult claims to mitigation, and other circumstances dictate.

V.

The timing of the required hearing is in dispute, however.

Morrissey and *Gagnon* do not determine whether Shepard is entitled to a revocation hearing during his intervening prison sentence. It is nevertheless clear that during his intervening incarceration he does have a due process right to contest in some meaningful manner the parole violation warrant lodged against him as a detainer.

The Board "often" makes the decision not to revoke where a parolee such as Shepard has served a prison sentence for the intervening offense underlying the warrant pending against him.[3] But when the Board does not reach this decision until after the parolee has been transferred to a federal facility, his confinement there is unwarranted. Due process protects parolees from such unwarranted confinement. *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781 (1973).

The Board relies on the Court's statement in *Morrissey* that a two-month lapse between a parolee's reimprisonment and his final revocation hearing was not unreasonable. 408 U.S. at 488.[4] The parolees in *Morrissey*, however, had not been sentenced to an intervening term of imprisonment. Consequently,

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[3] Under the regulations that became effective on May 14, 1976, "[t]ime served on a new state or federal sentence [must] be credited as time in custody." 28 C.F.R. § 2.21(b)(2).

[4] The new parole act requires merely that the revocation hearing be held within ninety days of the parolee's "retaking," which according to the Board occurs when he is delivered into custody to begin serving his violator term. 18 U.S.C. § 4214(c).

prior to the commencement of the two-month period of incarceration sanctioned there, the Board had had virtually no notice of the need for a revocation hearing and the parolees had not already served prison terms for the misconduct charged in their parole violation warrants. By contrast, in a case such as Shepard's, the Board has no comparable excuse for delay, and the possibility of further unjustified incarceration appears to be considerably greater.

Shepard's several interests in obtaining the withdrawal of the warrant before the end of his intervening confinement are cognizable under the due process clause.

The Board does not dispute Shepard's claim that, solely because of the parole violation warrant lodged against him, he has been denied valuable privileges generally available to inmates, including participation in educational and temporary release programs. And the tendency of state prison authorities, in general, to treat inmates subject to federal detainers as ineligible for confinement in less restrictive institutions, more desirable work assignments, educational release programs, work release programs, furloughs and other rehabilitative programs is well established. See, *e.g.*, *Cooper* v. *Lockhart*, 489 F.2d 308, 313-14 & n. 10 (8th Cir. 1973) and authorities cited therein; *Gay* v. *United States Board of Parole*, 394 F. Supp. 1374, 1377 (E.D. Va. 1975); S. Rep. No. 1356, 91st Cong., 2d Sess. (1970), U.S. Code Cong. & Admin. News 4864, 4866. Furthermore, a pending parole violation detainer can delay an inmate's

parole from his intervening term of imprisonment. See, *e.g.*, *Jones* v. *Johnston*, —— F.2d ——, ——, slip op. at 25 (D.C. Cir., March 23, 1976); *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632, 637 (7th Cir. 1975); *Cooper* v. *Lockhart*, 489 F.2d 308, 314 n. 10 (8th Cir. 1973); *Gay* v. *United States Board of Parole*, 394 F. Supp. 1374, 1377 (E.D. Va. 1975). An inmate's loss of eligibility for rehabilitative programs or the postponement of his parole can constitute a "grevious loss" of his "liberty" or "property" within the contemplation of the due process clause. *Cardaropoli* v. *Norton*, 523 F.2d 990, 995 (2d Cir. 1975).[5]

Moreover, Shepard has an interest in obtaining the Board's consideration of evidence allegedly mitigating the charges underlying his parole violation warrant before this evidence is significantly im-

[5] *Cardaropoli* held that due process requires that a federal prisoner be afforded a hearing prior to his designation as a "Special Offender" on the ground that designation as such generally " 'delays or precludes social furloughs, release to half-way houses and transfers to other correctional institutions' " and " 'in some cases . . . may bar early parole.' " 523 F.2d at 994. The court reasoned:

> The Special Offender classification works serious alteration in the inmate's conditions of confinement because it hinders or precludes eligibility for these important rehabilitative programs. We therefore conclude that the marked changes in the inmate's status which accompany the designation create a "grievous loss", *Morrissey* v. *Brewer* . . . and may not be imposed in the absence of basic elements of rudimentary due process.

523 F.2d at 995.

paired by the passage of time. *E.g.*, *Jones* v. *Johnston*, —— F.2d ——, ——, slip op. at 17-19 (D.C. Cir. March 23, 1976); *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632, 637 (7th Cir. 1975); *Cooper* v. *Lockhart*, 489 F.2d 308, 312-13 (8th Cir. 1973); *Gay* v. *United States Board of Parole*, 394 F.Supp. 1374, 1378 (E.D. Va. 1975); *United States ex rel. Vance* v. *Kenton*, 252 F. Supp. 344, 346 (D. Conn. 1966).

Finally,

> The parolee also has a definite, personal interest in being relieved of uncertainty as to what his future will be. . . . [T]he Supreme Court recognized in Smith v. Hooey [393 U.S. 374 (1969)] that the anxiety and depression resulting from a detainer based on a pending criminal indictment may have a severely corrosive effect on rehabilitation. We have no reason to believe that the effects are any less significant when the detainer is lodged because of a parole violation.

Jones v. *Johnston*, —— F.2d ——-——, slip op. at 20-21 (D.C. Cir., March 23, 1976) (footnotes omitted). See also *Cooper* v. *Lockhart*, 489 F.2d 308, 314-15 & nn. 10 and 11 (8th Cir. 1973).[6]

[6] Shepard makes the additional argument that "refusal of the Board to give a parole violation hearing at a time when it can exercise the full range of its discretion . . . deprives the parolee of an opportunity to obtain the extent of concurrency which he is entitled to receive and which is appropriate in his case." See also *Jones* v. *Johnston*, —— F.2d ——, ——-——, slip op. at 24-25 (D.C. Cir. March 23, 1976). But, although this line of argument may apply in other situations, it does not here since Shepard was originally sentenced pursuant to the

In short, the existence on file of Shepard's parole violation detainer during his confinement by New York State subjects him to "grevious loss." See *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), *citing Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, *J.*, concurring). We therefore conclude that this detainer should not have been allowed to stand "in the absence of basic elements of rudimentary due process," *Cardaropoli* v. *Norton*, 523 F.2d 990, 995 (2d Cir. 1975).

VI.

> The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard" to insure that they are given a meaningful opportunity to present their case.

Mathews v. *Eldridge*, —— U.S. ——, ——, 44 U.S. L.W. 4224, 4233 (Feb. 24, 1976) (citations omitted).

Prior to its decision to allow Shepard's detainer to stand, the Board did not give him either adequate "notice of the case against him" or adequate "opportunity to meet it." While he apparently knew that

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Youth Corrections Act and thus, under provisions applicable to individuals sentenced thereunder, could not be denied credit against his sentence for time served during his parole in the event of its revocation. See 28 C.F.R. § 2.10(b) and 2.52(d)(1) (currently in effect); 28 C.F.R. § 2.10(c) and 2.51 (in effect prior to May 14, 1976).

the detainer was based on his intervening conviction, it is unclear whether the Board, in deciding not to withdraw the detainer, was influenced by other information relevant to the appropriateness of continuing his confinement. Failing to ensure Shepard's ability to know and contest such information, the review procedure applied by the board did not afford him "a meaningful opportunity to present [his] case" and thus fell short of due process requirements.

VII.

Since May 14, 1976, 18 U.S.C. § 4212 and 28 C.F.R. § 2.47 have required that a parole violation detainer be reviewed by the Parole Commission (the reconstructed Board's new title) within 180 days of its notification of the detainer's placement and that the parolee be afforded notice of the pending review, opportunity to submit a written application containing information relevant to the detainer's disposition, and—at public expense in the event of the parolee's indigence—assistance of counsel in the application's preparation. Like 28 C.F.R. § 2.53 before them, the new detainer-review provisions do not grant the parolee the right to contest the detainer by means of an in-person evidentiary hearing.[7]

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[7] 18 U.S.C. § 4214 provides in pertinent part:

> (b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section.

In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a) (2) (B) of this section to assist him in the preparation of such application. (2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a) (2) (B) of this section.

(3) following the disposition review, the Commission may:

(A) let the detainer stand; or

(B) withdraw the detainer.

28 C.F.R. § 2.47 is one of a set of proposed regulations which were published on an emergency basis to provide working rules under the new act pending the promulgation of permanent regulations in accordance with 5 U.S.C. § 553(b). It provides in pertinent part:

(a) In those instances where a parolee is serving a new sentence in an institution, a parole violation warrant may be placed against him as a detainer. Such warrant shall be reviewed by the regional Commissioner not later than 180 days following notification to the Commission of such placement. The parolee shall receive notice of the pending review, and shall be permitted to submit a written application containing information relative to the disposition of the warrant. He shall also be notified of his right to request counsel under the provisions of

Although the detainer-review procedure established by the new provisions is more protective of the parolee in Shepard's situation than its predecessor, it too suffers from constitutional infirmity: it also fails to advise the parolee adequately of the case against him.

We think it necessary that at some point before the Commission decides not to withdraw the parolee's detainer, it disclose to him in unabridged form all the evidence which may be considered against him, except to the extent that the Commission meets the heavy burden of establishing good cause for its nondisclosure.[8] *Cf. United States ex rel. Carson* v. *Tay-*

§ 2.48(b) to assist him in completing his written application.

(b) Following a dispositional review under this section, the regional Commissioner may:

(1) Let the detainer stand and order further review at an appropriate time;

(2) Withdraw the detainer and (i) order reinstatement of the parolee to supervision upon release from custody, or (ii) close the case if the expiration date has passed;

(3) Order a revocation hearing to be conducted by a hearing examiner or an official designated by the regional Commissioner at the institution in which the parolee is confined.

[8] 18 U.S.C. § 4214(b)(1)'s requirement, repeated in 28 C.F.R. § 2.47(a), that the parolee "receive notice of the pending review," see note 7 *supra*, cannot be reasonably construed to mandate such disclosure since, in contrast, § 4214(a)(2)(D) provides, with respect to the revocation hearing of the parolee whose violation has yet to be established, for "opportunity for the parolee to be apprised of the evidence against him."

lor, —— F.2d ——, ——, slip op. 5075, 5084-84 (2d Cir., July 22, 1976). Moreover, the Commission must effect this disclosure soon enough to allow the parolee a meaningful opportunity to contest, mitigate or explain the evidence revealed. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' "

However, while Shepard had a right to something more than the review procedures established by 28 C.F.R. § 2.53, when this case arose, and by 18 U.S.C. § 4214 now, we do not believe that due process necessarily entitled him to an in-person hearing. Rather we conclude that Shepard's due process rights would have been met had he been afforded (1) the safeguards now mandated by 18 U.S.C. § 4214, (2) full and timely disclosure of the evidence to be considered against him, and (3) a specific statement of the factual findings and reasoning underlying the decision arrived at concerning his detainer.

The importance of the disclosure requirement has already been emphasized. The administrative cost of compliance with it should be relatively insignificant. *United States ex rel. Carson* v. *Taylor*, —— F.2d ——, ——, slip op. 5075, 5085 (2d Cir., July 22, 1976). Nor should compliance with the requirement of a statement of factual findings and reasoning be very burdensome to the Commission, whereas

> This requirement, if properly observed, should serve to protect the inmate from arbitrary and capricious decisions or actions grounded upon impermissible considerations. The compulsion upon the decisionmaker to set forth the reasons . . . of denial . . . , with some specificity, "promotes thought by the decider" and impels him to "cover the relevant points."

Haymes v. *Regan*, 525 F.2d 540, 543-44 (2d Cir. 1975) (citation omitted).

Our determination that due process does not necessarily entitle Shepard to an in-person evidentiary hearing is founded upon several considerations. First, requirement of such a hearing in all cases would entail substantial administrative cost.[9]

Second, whatever error may occur in the absence of such a requirement is minimized by the procedural rights guaranteed the parolee under this decision and 18 U.S.C. § 4214. Since § 4214 ensures the parolee assistance of counsel, a hearing is not needed to remedy his possible inability to express himself effectively on paper. See *Mathews* v. *Eldridge*, —— U.S. ——, ——, 44 U.S.L.W. 4224, 4232 (Feb. 24, 1976), *distinguishing Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). And the fact that the parolee's written review application lacks some of the flexibility of an oral presentation is to a large extent compensated for by his right to prepare the application, with assistance of counsel, with knowledge of all the evidence to be considered against him. See *Eldridge*, —— U.S. at ——, 44 U.S.L.W. at 4232, *distinguish-*

[9] The federal parolee serving an intervening federal sentence presents less of a problem.

ing Goldberg, 397 U.S. at 269. Moreover, the core of the factual findings upon which the review of the parolee's detainer is based is conclusively established by his intervening conviction. *Morrissey* v. *Brewer*, 408 U.S. at 490; *compare Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975).

Third, the legislative history of § 4214 manifests unequivocally the judgment of Congress that an in-person hearing requirement was not warranted. *E.g.*, S. Rep. No. 648, 94th Cong., 2d Sess. 35 (1976). This judgment, of course, is entitled to "substantial weight" "in assessing what process is due in this case." *Eldridge*, —— U.S. at ——, 44 U.S.L.W. at 4233.

Finally, 18 U.S.C. § 4214(b)(2) provides:

> B If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

See also 28 C.F.R. § 2.47(b)(3). Thus, the possibility of a parolee not being "given a meaningful opportunity to present [his] case" is further reduced.

VIII.

Since Shepard's treatment pursuant to 28 C.F.R. § 2.53 violated his due process rights under the fifth

amendment, we reverse and remand. If the court below finds that the consequent delay in according him these rights would so impair his ability to adduce mitigating evidence that a constitutionally adequate review of his case would not now be possible, it may order the warrant quashed. Otherwise, the Commission should be required to review Shepard's detainer in conformance with this opinion within such time as the court may fix. See *e.g.*, *United States ex rel. Blassingame* v. *Gengler*, 502 F.2d 1388 (2d Cir. 1974); *United States ex rel. Buono* v. *Kenton*, 287 F.2d 534, 536 (2d Cir.), *cert. denied*, 368 U.S. 846 (1961); *Jones* v. *Johnston*, —— F.2d ——, ——-——, slip op. at 46-47 (D.C. Cir., March 23, 1976); *Johnson* v. *Holley*, 528 F.2d 116, 119 (7th Cir. 1975); *Cleveland* v. *Ciccone*, 517 F.2d 1082, 1089 (8th Cir. 1975).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

75-CV-597

THE UNITED STATES OF AMERICA EX REL.
LYMAN T. SHEPARD, RELATOR

—against

UNITED STATES BOARD OF PAROLE, RESPONDENT

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION AND ORDER

Petitioner is presently an inmate of Clinton Correctional Facility pursuant to a commitment of the Supreme Court, New York County, dated December 17, 1974, for a term of 0-4 years.

According to the petition, in July 1972, he was sentenced to a federal penitentiary "under the Federal Youthful Act to a term of 0-6 years", properly the Federal Youth Corrections Act. He was released on parole on April 18, 1974, but after the conviction in the New York Supreme Court, in December 1974, the United States Board of Parole in accord with routine and customary practice lodged a detainer

warrant against him. Petitioner requested an immediate revocation hearing but the Parole Board wrote to petitioner on July 23, 1975, and advised that it would review his case in 120 days to determine if the detainer should be lifted, but otherwise it would be reviewed again next year. Petitioner alleges that as a result of the detainer, he has lost privileges; he was prevented from entering a program of college education and a temporary release program; his opportunity to defend against the violation is prejudiced by the loss of witnesses and the dimming of memories, etc. He relies on Morrissey v. Brewer, 408 U.S. 471 (1972) and United States ex rel. Hahn v. Revis, 520 F. 2d 632 (7th Cir. 1975).

This court has reviewed challenges of this kind most recently in a memorandum decision and order dated October 15, 1975, in United States ex rel. Martinez v. Crawford, 75-CV-503. The challenges are increasing and ruling by the Court of Appeals, Second Circuit, on such questions would be helpful. In the Martinez case, I concluded habeas corpus did not lie as the correct remedy; that significant differences existed between Morrissey and that of Martinez, in their cases noted above, in that Morrissey involved a state parolee, rather than a federal parolee as in the Martinez case and as here, and neither parolee in Morrissey had been convicted of a criminal offense violative of his parole. These differences, this court held, were pointed up in Gaddy v. Michael, 519 F. 2d 669 (4th Cir. 1975). This court then concluded that the distinctions were valid

and persuassive and that no inflexible time limit for parole revocation hearings applied to the United States Parole Board. In petitioner's case, the letter of the United States Board of Parole indicates that review of petitioner's case is ongoing.

The Clerk of the Court shall mail copies of the Martinez decision referred to herein to petitioner; and to Curtis C. Crawford, Regional Director, U.S. Board of Parole, Northeast Regional Office, Scott Plaza II, Philadelphia, Penna. 19113. A copy of this decision is being mailed directly to petitioner by my office.

The petition for habeas corpus shall be filed without payment of fee and is denied and dismissed.

It is so Ordered.

Dated: December 19, 1975
Albany, New York

/s/ James T. Foley
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

76-2021

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Seventh day of September one thousand nine hundred and seventy six.
Present:

HON. IRVING R. KAUFMAN, Chief Judge
HON. WALTER R. MANSFIELD
HON. J. JOSEPH SMITH
Circuit Judges

LYMAN T. SHEPARD, PETITIONER-APPELLANT

v.

UNITED STATES BOARD OF PAROLE,
RESPONDANT-APPELLEE

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court, with costs to be taxed against respondent-appellee.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-2021

LYMAN T. SHEPARD, APPELLANT

v.

UNITED STATES PAROLE COMMISSION, APPELLEE

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States Parole Commission, Appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Second Circuit reversing the dismissal of the petition for writ of habeas corpus, entered in this action on September 7, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1252.

/s/ Mitchell B. Dubick
MITCHELL B. DUBICK
Counsel for Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-2021

LYMAN T. SHEPARD, APPELLANT

v.

UNITED STATES PAROLE COMMISSION, APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 1976, copies of this NOTICE OF APPEAL were mailed, postage prepaid, to counsel for appellant, Phyllis Skloot Bamburger, Federal Defenders Services Unit, the Legal Aid Society, 509 United States Court House, Foley Square, New York, New York 10007. I further certify that all parties required to be served have been served.

/s/ Mitchell B. Dubick
MITCHELL B. DUBICK
Counsel for Appellee

APPENDIX E

1. 18 U.S.C. (1970 ed.) 4205 provided:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

2. 18 U.S.C. (1970 ed.) 4207 provided:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

3. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 227-230, amending 18 U.S.C. 4214, provides in pertinent part:

> (a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—
>
> (A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:
>
> (i) continuation of revocation proceedings is not warranted; or
>
> (ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;
>
> (iii) the parolee is not likely to fail to appear for further proceedings; and
>
> (iv) the parolee does not constitute a danger to himself or others.
>
> (B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest with-

in sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the

Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

(3) Following the disposition review, the Commission may:

(A) let the detainer stand; or
(B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his

parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;
(2) reprimand the parolee;
(3) modify the parolee's conditions of the parole;
(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or
(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

4. The United States Board of Parole's regulation relating to detainers at the time of the district court's decision, 28 C.F.R. 2.53 (1975), provided:

(a) In those instances where the prisoner is serving a new sentence in an institution, the

warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand;

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision, thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual review relative to

the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 224520 23

No. 76-752

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES PAROLE COMMISSION, APPELLANT

v.

LYMAN T. SHEPARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE APPELLANT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-752

UNITED STATES PAROLE COMMISSION, APPELLANT

v.

LYMAN T. SHEPARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE APPELLANT

Appellee does not take issue with our argument that the court of appeals' decision in this case is inconsistent with *Moody* v. *Daggett*, No. 74-6632, decided November 15, 1976. Rather, he makes several arguments designed to avoid the consequences of that inconsistency. We respond below to these arguments.

1. Appellee contends (Mot. to Dismiss 5) that this case is moot because he has been paroled from his state sentence. It is not moot. The court of appeals remanded this case to the district court with instructions to conduct a hearing to determine whether the Parole Commission's delay in holding appropriate proceedings prejudiced appellee; if the district court finds prejudice, it is to quash the parole violator warrant (J.S. App. 19a). The effect of such a decision would be that the Commission may not revoke appellee's parole because of the intervening New York crime of second degree

robbery. That controversy—whether the Commission has forfeited its right to revoke appellee's parole—is live, and whether appellee remains in state custody is irrelevant to its disposition.

In our view this case would become moot only if the Parole Commission were to decide not to revoke appellee's parole despite his intervening state crime. See *Weinstein* v. *Bradford*, 423 U.S. 147; *Preiser* v. *Newkirk*, 422 U.S. 395. If appellee were released, the controversy concerning the propriety of his continued confinement because of his intervening state crime would come to an end. But appellee has not yet been released from federal custody, and his federal sentence does not expire until July 1978.[1]

2. Appellee argues (Mot. to Dismiss 4-5) that the court of appeals did not hold an Act of Congress unconstitutional but simply ordered the Parole Commission to provide procedures not otherwise required by an Act of Congress. The court of appeals had a different view of its action,

[1]The Parole Commission has scheduled a hearing for January 11, 1977, at which a panel of examiners will take evidence and make a recommendation concerning the revocation of appellee's parole on account of the intervening offense. This recommendation then will be reviewed by the regional office of the Parole Commission. If the Commission should decide not to revoke appellee's parole, this case would become moot. There is no reason, however, for the Court to defer consideration of this case while the Commission makes its decision. If the Commission disposes of this case in a way that makes it moot, we will inform the Court promptly. It then would be appropriate to vacate the judgment of the court of appeals and to remand the case to the district court with instructions to dismiss the complaint (see *Weinstein* v. *Bradford*, *supra*, 423 U.S. at 149), not, as appellee suggests, to dismiss the appeal. On the other hand, if the Court were to defer the decision on probable jurisdiction, the chance of obtaining a decision in this case during the present term would be virtually eliminated unless the Court were to treat the case summarily.

however. It wrote that the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*, amending 18 U.S.C. 4201 *et seq.*, "suffers from constitutional infirmity" (J.S. App. 15a). The court of appeals therefore devised, and required the Parole Commission to follow, procedures that it believed would rectify the "constitutional infirmity" of the statute.[2] This is, therefore, the type of case in which review lies by appeal pursuant to 28 U.S.C. 1252.

3. Appellee suggests (Mot. to Dismiss 5-8) that this case should be remanded for further proceedings to determine whether he was prejudiced because of any delay in holding the hearings the court of appeals believes are required. There is no purpose in such a remand. As we have argued in the jurisdictional statement, this case is governed by *Moody*, and a remand of the sort suggested by appellee would be an exercise in futility. Appendices A and C to appellee's Motion to Dismiss make it clear that appellee never told the Parole Commission that he desired to present mitigating evidence or that important facts might become unavailable during a lapse of time. Even if such a demonstration now were relevant (and, in light of *Moody*, we believe that it would not be), nothing appellee could now establish would excuse his failure to present these claims to the Parole Commission at an earlier date and to offer it an opportunity to evaluate the evidence to determine whether,

[2]The legislative history of the Parole Commission and Reorganization Act indicates that Congress considered and rejected suggestions that the Parole Commission should be required to provide procedures more elaborate than those specified in the Act. See, *e.g.*, S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 35 (1976). Congress was delineating the procedures that it wanted the Parole Commission to follow, not setting minima to which courts could add at their option.

if true, it would be material to decisions concerning appellee's parole.[3]

For these reasons, in addition to the reasons in the jurisdictional statement, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[3]Here, as in *Moody*, although appellee makes general claims that evidence may have been lost, he does not say, even in this Court, what this evidence is, why it is no longer available, or why it would affect the Parole Commission's decisions.